

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x
3 UNITED STATES OF AMERICA,
4 Plaintiff,

11 CR 623

5 versus

United States Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

6 AGRON HASBAJRAMI,

7
8 DEFENDANT.
9 -----x

January 23, 2015
10:15 a.m.

TRANSCRIPT OF ORAL ARGUMENT

11 Before: HON. JOHN GLEESON,

DISTRICT COURT JUDGE

12 APPEARANCES

13 LORETTA LYNCH

14 United States Attorney - Eastern District of New York
271 Cadman Plaza East
15 Brooklyn, New York 11201

SETH DuCHARME, ESQ.

16 SERITHA KOMATIREDDY, ESQ.

Assistant United States Attorneys

17
18 ATTORNEY FOR DEFENDANT:

19 MICHAEL BACHRACH, ESQ.

20 For the Amicus Party:

21 PATRICK C. TOOMEY, ESQ.

ALEX ABDO, ESQ.

22 JAMEL JAFFER, ESQ.

23 Reporter: ALLAN R. SHERMAN, CSR, RPR
225 Cadman Plaza East Rm 374
24 Brooklyn, New York 11201

Tel: (718) 613-2529 Fax: (718) 613-2630

25 Proceedings recorded by mechanical stenography, transcription
by CAT.

ALLAN R. SHERMAN, CSR, RPR Official Court Reporter
United States District Court Eastern District of New York

Oral Argument

1 THE CLERK: Criminal cause for motion hearing,
2 United States of America versus Agron Hasbajrami, docket
3 number 11 CR 623.

4 Counsel, please state your appearances for the
5 record.

6 (Official Albanian (Tosk) Interpreter present, Uk
7 Lushi.)

8 THE COURT: State and spell your name for the
9 record.

10 MR. DuCHARME: For the United States Seth DuCharme,
11 Matthew Amatruda and Saritha Komatireddy.

12 And this morning we're joined at counsel table by
13 Joe Palmer and Danya Tia from the National Security Division
14 of the Department of Justice.

15 MR. BACHRACH: Your Honor, for the defendant Agron
16 Hasbajrami, Michael Bachrach.

17 Mr. Zissou and Mr. Dratel were unable to be here
18 today. I apologize. Seated with me, I'll let them introduce
19 themselves.

20 MR. TOOMEY: Good morning, your Honor.

21 Patrick Toomey from the ACLU. I'm here with my
22 colleagues Alex Abdo and Jamel Jaffer.

23 THE COURT: Good morning, everyone.

24 Do you want to be heard in support of your motion?

25 MR. BACHRACH: Your Honor, at its core, the

Oral Argument

1 suppression motion really comes down to the question of
2 whether or not the U.S. can spy on U.S. persons within the
3 United States without a warrant.

4 We believe the Fourth Amendment says no. We believe
5 the FAA says no. And the parties have collectively devoted
6 over 350 pages to this question so I don't pretend to believe
7 it's an uncomplicated one.

8 Before I really get to the heart of the motion
9 though, I feel I need to point something out, and that is that
10 from the defense perspective, these motions or at least the
11 second motion which is the as applied challenge to the
12 statute, the defense position is that that motion is not fully
13 briefed and cannot be fully briefed until defense counsel
14 receives copies, even if it's within the confines of the
15 Classified Information Procedures Act, but copies of the
16 government's legal arguments with respect to their response to
17 the second motion.

18 We understand there may be reasons for national
19 security purposes that we can't see the actual FISA material,
20 although we debate that, but we think at the very least, due
21 process requires us to see those legal arguments so that we
22 can effectively research and respond to them because right
23 now, it's a complete vacuum and we have no idea what the
24 government has said.

25 With respect to the motions themselves, your Honor,

Oral Argument

1 I think -- quite frankly, I think I briefed it as thoroughly
2 as I think we can possibly can and I really would rather know
3 if there is a particular area your Honor would like us to go
4 into, otherwise, I'm actually quite comfortable resting on the
5 briefs or turning to counsel for the amici if they have
6 something to say or with respect to the suppression motion. I
7 am going to assume for a moment that you want me to wait
8 before discussing all the other motions.

9 If I'm wrong --

10 THE COURT: That's fine with me. If I have
11 questions, I won't be bashful.

12 MR. BACHRACH: Thank you.

13 THE COURT: Gentlemen, do you want to be heard?

14 MR. TOOMEY: Yes, your Honor.

15 My name is Patrick Toomey from the ACLU.

16 Thank you, your Honor, for allowing us to
17 participate in this morning's hearing.

18 As you know, we filed a brief addressing the
19 constitutionality of the FISA Amendments Act, and with your
20 permission, I'd like to address a few issues raised in the
21 government's papers and, of course, entertain any questions
22 that the Court may have.

23 The three issues that I would like to address are
24 the feasibility of a warrant requirement, the applicable of
25 the International Overhear Rule and the availability of a

Oral Argument

1 foreign intelligence exception.

2 The first issue, the feasibility of the warrant
3 requirement. The government's position is that a warrant
4 requirement would be unworkable.

5 It claims that to require a warrant for surveillance
6 under the FAA would be to require a warrant any time the
7 government engages in foreign surveillance targeted at a
8 foreigner abroad. That is not true.

9 THE COURT: You know what, come on up here to this
10 shelf.

11 MR. TOOMEY: Thank you, your Honor.

12 The government claims that to require a warrant for
13 foreign surveillance targeted at individuals abroad would be
14 to require a warrant any time on the off chance that the
15 government's surveillance might sweep up the communications of
16 an American.

17 The Fourth Amendment doesn't require that however.
18 What the Fourth Amendment requires is at a minimum, the
19 government do one of two things; take reasonable precautions
20 to avoid intercepting the communications of Americans without
21 a warrant or to obtain a warrant when it seeks to look at an
22 American's communications that it has collected the course of
23 that foreign intelligence surveillance.

24 That requirement is entirely workable and would not
25 comprise the government's legitimate interests in gathering

Oral Argument

1 foreign intelligence. The warrant requirement is the Fourth
2 Amendment's default rule, and in a sense, it's always
3 burdensome for the government to obtain a warrant to collect
4 information or to engage in a search.

5 The mere fact that it has to go through the judicial
6 process to do so is not the type of burden that the Fourth
7 Amendment excuses. And the Supreme Court recognizes as much
8 in Keith when it addressed intelligence gathering in the
9 domestic context. The proposal to incorporate a warrant
10 requirement is not novel either. There have been proposals
11 put forth by then Senator Obama in 2008 when the FISA
12 Amendment Act was first adopted. There have been more recent
13 proposals that would incorporate a warrant requirement from
14 both the President's Review Group and in a bill passed by the
15 House this past year.

16 These proposals show that there are various ways
17 incorporating this requirement and that there are more
18 reasonable alternatives available to the government in terms
19 of protecting Americans' communications in the course of this
20 surveillance.

21 On the second point, on the application of the
22 Incidental Overhear Rule, that rule has never operated as an
23 independent or a separate exception to the warrant
24 requirement. In fact, the cases show that precisely the
25 opposite is true.

Oral Argument

1 In the cases that the government points to, the
2 government had obtained a warrant to collect the
3 communications at issue and that warrant served to protect not
4 just the privacy interests of the person who was the subject
5 of the warrant, but also the privacy interests of other
6 parties who might be overheard. And cases like Donovan
7 Yannotti stand for that proposition.

8 Just as fundamentally, the practical consequence of
9 the government's application and location of the Incidental
10 Overhear Rule in this case would be to eliminate Americans'
11 pricey interests in their international communications.

12 It would mean that the government could target any
13 foreigner or every foreigner for surveillance and on that
14 basis collect every American's communications with those
15 foreigners without obtaining a warrant.

16 Similarly, the purpose of the surveillance that is
17 at stake under the FISA Amendment Act, the programmatic purpose
18 is to obtain the international communications of Americans.
19 And the scope of the surveillance that is being undertaken
20 pursuant to this statute bears that out. The government is
21 monitoring at least 89,000 targets under the statute according
22 to it's own transparency reports and according to both the
23 Privacy and Civil Liberties Oversight Board and other reports,
24 the amount of Americans' international communications being
25 collected is considerable.

Oral Argument

1 Under the third point, the applicability of the
2 foreign intelligence exception, as we lay out in our briefs,
3 we don't believe the government can satisfy that exception
4 because the warrant requirement is not impracticable in this
5 context and it has -- it can use a warrant to obtain the
6 information that it needs, but even more fundamentally, if
7 there is a foreign intelligence exception and that's something
8 with which we strongly disagree, it is not broad enough to
9 encompass the surveillance that the government is undertaking
10 here.

11 The cases that the government points to stand for
12 the proposition that there is a foreign intelligence exception
13 where the government -- it's an individualized finding that
14 the target is an agent of a foreign power and that finding
15 then personally certified by the president for the Attorney
16 General.

17 Even the Privacy and Civil Liberties Oversight Board
18 in its report, Section 702, found that it was not clear that
19 the exception that the government would carve out with respect
20 to this statute met the standard put forth in any of the
21 preceding cases.

22 Finally, I would just like to emphasize that what
23 this statute does is to allow the government, to give the
24 government nearly unfettered access to the international
25 communications of Americans, and the practical consequence of

Oral Argument

1 the government's arguments would be to eliminate Americans'
2 privacy interests in their international communications at a
3 time when global communications are becoming ever more common.

4 Thank you, your Honor.

5 If you have any questions.

6 THE COURT: Thank you Mr. Toomey.

7 MR. DuCHARME: May I approach as well, your Honor?

8 THE COURT: Yes.

9 MR. DuCHARME: Your Honor, it is quite correct that
10 the briefing was extensive in this case. That is not to say
11 however that the issues are extraordinarily complicated.

12 I think that there is general agreement, for
13 example, that what is at issue here is a subset of information
14 that is incidentally obtained under Section 702 and I think it
15 bears focusing on the title of the Statute 702, which is
16 Procedures for Targeting Certain Persons Outside the United
17 States other than the United States persons.

18 We feel confident, your Honor, that the statute and
19 the way that the government has effected executing that
20 statute is lawful and is reasonable under the Fourth
21 Amendment.

22 THE COURT: Excuse me.

23 If you turn off the mic, we won't be listening to
24 you confer.

25 MR. TOOMEY: Sorry.

Oral Argument

1 MR. DuCHARME: Your Honor, I don't think anyone
2 disputes that it's okay and reasonable, I don't think anyway,
3 for the U.S. government to target specific foreign persons in
4 foreign countries for a foreign intelligence purpose.

5 What I understand defense counsel and amici counsel
6 to be saying is they are concerned with the handling of the
7 incidental collection of U.S. persons that sometimes occurs
8 when 702 is executed against foreign targets.

9 More broadly in this case, what is at issue I think
10 here is the integrity really of the process by which the
11 government conducts its national security surveillance
12 programs. It's of importance obviously to the United States
13 national security interests. In this particular case, it's of
14 course of great importance to the defendant.

15 We extensively briefed the issue and provided
16 your Honor with a number of exhibits, supplemental filings
17 which are intended to make clear how that process actually
18 takes place in the real world.

19 THE COURT: Just don't talk.

20 MR. BACHRACH: Your Honor, if I may.

21 THE COURT: Is this the interpreter?

22 MR. BACHRACH: Yes.

23 THE COURT: I was led to believe by communications
24 from you that there wasn't going to be interpretation.

25 MR. BACHRACH: Only if Mr. Hasbajrami was having

Oral Argument

1 trouble understanding.

2 THE COURT: Okay.

3 Swear the interpreter.

4 (Albanian (Tosk) interpreter sworn, Uk Lushi.)

5 MR. DuCHARME: Sorry, your Honor.

6 To be clear, we want the defendant with respect to
7 this case but we also want the Court and the American people
8 to have confidence in the integrity of this process. We take
9 very seriously, of course, our constitutional obligations with
10 respect to the surveillance of U.S. persons.

11 What I think bears emphasizing is Section 702 does
12 not permit the targeting or reverse targeting of U.S. persons.
13 What happens occasionally is that when a foreign person is
14 targeted, a U.S. person is a party to a communication with
15 that person and that U.S. person's information is obtained in
16 the course of the 702 collection. It's not the intent of the
17 statute. There are mandated minimization in targeting
18 procedures to limit the risk of inadvertently targeting a U.S.
19 person. The Court knows what those procedures are. The law
20 requires them. The government requires them. The government
21 follows them. The FISC reviews them. Congress does oversight
22 over them on a routine basis. So there are oversights in
23 place.

24 In terms of the worry that every foreign person
25 could be targeted under every facility that they might use,

Oral Argument

1 really I think distorts what the statute says and what
2 hopefully the Court's understanding is of how the program
3 works.

4 In this particular case, judge, I think it also
5 bears focusing on the fact that this case is really important
6 because it implicates an interplay between a number of
7 different authorities.

8 The Title VII FISA authority where Section 702 is
9 which is really what is front and center here but also
10 traditional Title I and Title III FISAs which have been more
11 frequently litigated, and the other investigative tools that
12 are available to the United States government and law
13 enforcement agencies when they learn, for example, that a
14 person in the United States, in New York City for example, is
15 communicating with someone overseas about matters related to
16 terrorism. What did the United States government do in this
17 case? What does the United States do as a general matter?
18 And I hope that what we'll emerge from this litigation is a
19 better understanding and a greater confidence in how those
20 tools are used and not frankly abused.

21 We share in the concerns of the ACLU frankly and the
22 defendant in this case that there must and should be proper
23 limitations on government surveillance of U.S. persons. We
24 want the Court and the defendant and the American people to
25 have confidence that there are checks more broadly and that

Oral Argument

1 there were checks in this case and that the steps that we took
2 were reasonable.

3 In fact, we think that this case stands really as a
4 very good example of how these various legal authorities and
5 tools should be used.

6 Respectfully, judge, I think when I read the statute
7 and when I look at the cases that give us guidance on
8 balancing our national security efforts against foreign
9 persons with our need to protect the American people here at
10 home, I really think this case stands as an example largely
11 and clearly with respect to the notice issue, I am not saying
12 we have done everything perfectly but when we are talking
13 about reasonableness and good-faith and appropriateness and an
14 understanding of what the law requires of us and where the
15 boundaries should be and our obligations, I think this case
16 frankly stands as an example of what we are supposed to do.

17 THE COURT: When you say notice issue, you mean the
18 notice to Mr. Hasbajrami that he was subjected to 702
19 surveillance?

20 MR. DuCHARME: That's correct, judge. That was an
21 unfortunate mistake but when we realized we should have told
22 him, we told him. And reasonable minds perhaps could differ
23 as to what the appropriate remedy was for that late notice.
24 Yours was you put him back in the position that he would have
25 been had we given him the proper notice in the first place and

Oral Argument

1 that's where he now stands and given where we ended up, we
2 welcome the challenges by the defendant and by amicus and we
3 welcome the Court's scrutiny.

4 These are issues that frankly have not been
5 addressed previously very often by the Court and we welcome
6 the chance to allay some of the concerns raised by the
7 defendant and we welcome the Court's scrutiny. We want people
8 to have confidence in the integrity of our programs, the
9 reasonableness of our programs and the constitutionality of
10 our programs. These are obviously very sensitive and
11 important issues.

12 I think --

13 THE COURT: Does it make a difference whether the
14 communications at issue are specifically targeted
15 communications or on the other hand, what are called -- this
16 terminology is actually new to me, but upstream
17 communications?

18 Do you understand my question?

19 MR. DuCHARME: I think so.

20 THE COURT: From a Fourth Amendment perspective,
21 does it matter whether the incident or interception of a U.S.
22 person pursuant to 702 surveillance was obtained in connection
23 with a targeted, a targeted interception, specific
24 communication devices, interception to/from as opposed to
25 upstream?

Oral Argument

1 Do you understand my question?

2 MR. DuCHARME: I think I do, judge. And with your
3 indulgence, I would like to give my colleague to also engage
4 with the Court.

5 Ms. Komatireddy is fully prepared and eager to
6 address some of the Court's questions, and if that is okay
7 with you, I would like to give her a chance to engage.

8 MS. KOMATIREDDY: With respect to the two types of
9 collection that you are referencing, both are actually under
10 the statute what you would consider to involve targeting
11 because the statute requires that surveillance only be
12 conducted with the intention of targeting a non-U.S. person
13 located abroad to obtain foreign intelligence information.
14 And then the targeting procedures that are approved by the
15 Court promulgated by the Attorney General submitted to the
16 Court and approved by the FISC further delineate exactly how
17 the intelligence community identifies those targets. So with
18 respect to the two types of collection that you are
19 referencing, whether there is collection that is coming
20 directly from a service provider or from the
21 telecommunications backbone, the upstream collection, the
22 actual seizure of communications results from targeting of a
23 non-U.S. person.

24 THE COURT: I understand that. So it sounds like
25 the answer to my question you say is no, it doesn't matter.

Oral Argument

1 MS. KOMATIREDDY: Between the programs?

2 THE COURT: Is the likelihood of incidental
3 interception of a U.S. person different in those two contexts?

4 MS. KOMATIREDDY: I can't speak to the precise
5 likelihood. What I can say with respect to both of the
6 programs, we have in addition to the targeting procedures,
7 minimization procedures that are also submitted to the FISC
8 with respect to both programs, and as the Court is aware from
9 Judge Bates' opinion, those procedures have at times been
10 approved, at times have not been approved and have been
11 modified.

12 So with respect to both, there are safeguards in
13 place to insure that any incidental collection of U.S.
14 persons' communications is minimized as much as possible.

15 THE COURT: What is your response to your
16 adversary's claim that unless he sees all of your legal
17 argument, he can't adequately argue in support of this motion?

18 MS. KOMATIREDDY: Your Honor, it's certainly in
19 everyone's interest for defense to see as much of the legal
20 argument as possible. To the extent we redacted our brief,
21 it's because the law requires it. In this context, Congress
22 has set forth a very specific procedure for how to handle
23 classified information. And Section 1806 F sets out that
24 procedure and specifically contemplates ex parte briefing in
25 the context of a suppression motion.

Oral Argument

1 And as Judge Posner recently affirmed in his opinion
2 in Dowd in the Seventh Circuit, that procedure specifically
3 states that when the Attorney General declares the disclosure
4 of certain information to pose harm to national security, then
5 the next step is for the Court to review ex parte and in
6 camera that information and make a determination as to the
7 legality of the acquisition. Only if it's not capable of
8 making that determination on it own is disclosure deemed
9 necessary under the statute and is disclosure permitted.

10 We would respectfully submit that given all the
11 information that has been submitted in the classified form and
12 unclassified form, and the Court knows the content, without
13 commenting on exactly what was redacted, we would submit that
14 the material that was redacted was redacted for a legitimate
15 purpose and is covered by the declaration that was submitted
16 as to why disclosure of the material would pose harm and that
17 material taken as a whole gives the Court enough information,
18 full information to determine the legality of the acquisition
19 without disclosure.

20 THE COURT: Anything further from the government?

21 MR. DuCHARME: No, your Honor.

22 MS. KOMATIREDDY: No, your Honor.

23 THE COURT: Do you want to be heard with regard to
24 this aspect of your motions and then I'll hear you on the
25 other motions?

Oral Argument

1 MR. BACHRACH: Yes, your Honor.

2 May I approach?

3 THE COURT: Yes.

4 MR. BACHRACH: I'm going to work backward a little
5 bit, your Honor.

6 With respect to the last point that your Honor
7 raised with respect to whether or not we should be entitled to
8 this information, let me make one thing clear. We two
9 competing statutes here. We have FISA but we also have CIPA.
10 And FISA came first and was originally contemplated to not
11 allow defense counsel to be part of the equation unless the
12 Court absolutely thought it was necessary. But then just a
13 few years later, Congress created a new statute, CIPA, for the
14 very purpose of getting defense counsel who have the necessary
15 security clearance involved in the process.

16 Now, the two statutes have never really been
17 rectified. They have been at odds, however, here there is no
18 question that the relevant national security agencies made the
19 determination at the very beginning of this case that both
20 myself and Mr. Zissou, the two attorneys of record on this
21 case, were not a security risk and because we were not a
22 security risk, they gave us the relevant clearance, the
23 relevant national security clearance to be able to see
24 material related to this case, at the very least, to be able
25 to see the arguments related to this case so that due process

Oral Argument

1 can be supported.

2 In fact, under CIPA, your Honor, when the government
3 refuses to turn over material that is classified and refuses
4 to turn it over even to cleared counsel, this Court has the
5 authority to give the government a choice; turn over the
6 material or dismiss the entire case. That's within
7 your Honor's power under CIPA.

8 Now, I acknowledge that that is an extreme sanction
9 and I'm not asking for it here. I'm simply asking to be able
10 to see the material. But the point being, your Honor, the NSA
11 has made one determination, that we are cleared, we are not a
12 security risk, and the government has written in their brief
13 and appears to be arguing still to this day that now for
14 prosecutorial purposes, they take a different position. And
15 respectfully, your Honor, we really believe that that can't
16 stand.

17 With respect to the government's argument with
18 respect to whether or not the material, whether or not the
19 intercepts of these communications were incident, there are a
20 few problems with the government's argument.

21 First of all, every case discussing the incidental
22 overhear doctrine discusses it in the specter or in the
23 auspices of a warrant. So what we are dealing with in all of
24 those cases is there has been a warrant approved by a judge
25 upon probable cause and during the execution of that probable

Oral Argument

1 cause warrant, accidentally a little bit of material, a little
2 bit of intercepts were intercepted, not wide-scale programatic
3 intercepts that we have in this case.

4 In this case, we have surveillance programs that
5 have been authorized by Congress but are not subject to a
6 judge first approving a specific warrant. It doesn't include
7 a determination of probable cause for the specific target or
8 for Mr. Hasbajrami. It does not include any particularity
9 regarding the place, time, person or thing that can be
10 searched. And again, of course, all of it is issued by a
11 judge.

12 The only thing that the FISA Court does in relation
13 to the surveillance is approve whether or not the procedures
14 at use are compliant with the statute, not whether or not the
15 targets are appropriately being surveilled or intercepted
16 incidentally, which again, we don't believe can be incidental
17 when the government is fully aware that the way it is
18 conducting its surveillance program, it is intended to capture
19 not simply the recordings of a target abroad who is a foreign
20 national, but an individual on U.S. soil or actually many
21 individuals on U.S. soil who are either U.S citizens or
22 permanent lawful residents, U.S. persons as they are both
23 collectively defined under the statute and under the case law.
24 It is completely different, your Honor.

25 The particular case that the government relies upon

Oral Argument

1 in its briefs to say that that particular targeting period --
2 that these procedures were appropriate, that they have these
3 protections and these mechanisms, the case they refer to is In
4 Re Directives.

5 In Re Directives covered the same time period or at
6 least part of the same time period as the intercepts in this
7 case and in In Re Directives, the Court concluded the FAA
8 itself wasn't even being followed properly and then the Court
9 had to say no, you have to do it differently.

10 I'm not privy to whether or not the material they
11 are using against Mr. Hasbajrami was collected before or after
12 the procedures were corrected. All I know is that during that
13 time period, the FISA Court of review determined that the FAA
14 and its programs were not even following even the FAA's own
15 statute, let alone whether or not it's constitutional.

16 And again, the Constitution is clear, you need a
17 warrant; you need probable cause; you need a judge with a
18 specific case in controversy examining whether or not it's
19 appropriate to issue a warrant in this case, not just some
20 broad, very broad shot in the dark.

21 If I may beg your indulgence, your Honor, for a
22 second, an analogy. There is a movie and a book right now
23 that is very popular. It's called American Sniper. And I
24 think a sniper is a good analogy to the FAA program.

25 A sniper targets a very specific target who is

Oral Argument

1 supposed to be a foreigner or an enemy of the state. The FAA
2 ostensibly targets, if it's working properly, a noncitizen
3 abroad. But the way the FAA does it is instead of using a
4 sniper's rifle, it uses a machine gun. Instead of using a
5 scope, it puts on a blindfold. And instead of targeting
6 foreign persons abroad, it turns around with the machine gun
7 and just sprays across at anything it can hit on U.S. soil.

8 That is not constitutional, your Honor. That is not
9 consistent with the Fourth Amendment. And it's certainly not
10 consistent with when the defendant individually specifically
11 in this case is a U.S. person who at all times relevant to
12 this case is on U.S. soil.

13 Lastly, your Honor, United States versus Verdugo,
14 which the government also cites, shouldn't be lost on
15 your Honor.

16 The Verdugo case talks about the fact that when a
17 foreigner is targeted abroad, it is constitutional to
18 surveillance them. But in Verdugo, the entire surveillance
19 was occurring abroad and that was what made it constitutional,
20 the fact that it was a noncitizen and it was occurring abroad.

21 Here, your Honor, we have surveillance and just
22 about I think all of both upstream and to/from surveillance,
23 the actual intercepts are occurring on U.S. soil and then
24 specifically in this case of a U.S. person.

25 So even under Verdugo, the Fourth Amendment says

Oral Argument

1 this cannot stand.

2 I'll defer now to amicus counsel.

3 THE COURT: All right.

4 Thank you.

5 MR. TOOMEY: Thank you.

6 The government tried to convey the impression that
7 the incidental collection of Americans' communications under
8 the statute is a de minimus consequence of any type of
9 surveillance but that is not the case. The collection at
10 issue under 702 as much as the government attempts to describe
11 it as targeted at foreigners located abroad might equally be
12 labeled as targeted at Americans' international communication.

13 One of the programmatic purposes of the law was to
14 collect those communications and the government does so in
15 great quantity under the statute.

16 The Fourth Amendment does not contain the word
17 target but what matters under the Fourth Amendment is whether
18 the surveillance or the search invades an American's
19 reasonable expectation of privacy and the government at least
20 nominally in this case does not disagree with that
21 proposition, that Americans have a recognized privacy interest
22 in their international communications.

23 The scope of the incidental collection in this case
24 and the invasion of privacy goes directly to the
25 reasonableness question that is before the Court. And the

Oral Argument

1 reasonableness of these procedures and the statute as a whole
2 is not borne out by the facts as to the surveillance that the
3 government points to. The statute permits collection without
4 prior judicial review without a finding of probable cause and
5 without any type of particularity. It leaves an immense
6 amount of discretion in the hands of lower level executive
7 branch officials and that is proven even more by the targeting
8 and minimization procedures.

9 One might think that if the surveillance was
10 targeted simply at foreigners located abroad, that the
11 government would undertake reasonable efforts to exclude the
12 communications of Americans when it collects them in the
13 course of a surveillance.

14 There is nothing like that in the targeting
15 procedures for the statute. Equally, one might think that if
16 the government were seeking to protect the privacy of
17 Americans' communications, the minimization procedures would
18 require the government to go through the communications and
19 sift out or segregate Americans' international communications.
20 That is not the case.

21 What in fact the minimization procedures allow is
22 the government in most cases to retain Americans'
23 communications for up to five years and in the course of a
24 dozen exceptions to keep those communications indefinitely.
25 The procedures also allow the government to dip into this pool

Oral Argument

1 of incidentally collected communications and search using the
2 names or identifiers associated with U.S. persons for
3 information about those Americans in the course of ordinary
4 criminal investigations.

5 The Privacy and Civil Liberties Oversight Board
6 reported that the FBI does so routinely even at the assessment
7 stage of national security investigations and that it also
8 does so in the course of some ordinary criminal
9 investigations.

10 What that does is convert a pool of data that the
11 government says was acquired to target foreigners abroad for
12 foreign intelligence purposes into an every day law
13 enforcement tool for the FBI. And our position is that the
14 procedures that currently exist don't satisfy the
15 reasonableness requirement and instead, a warrant should be
16 required when the government wants to access that information
17 at the back end or in order to acquire Americans'
18 communications at the front end.

19 Finally, just on your question about the upstream
20 surveillance, your Honor, upstream surveillance raising a host
21 of different legal problems separate from the prison program
22 that is described in the papers. And you can see some of
23 those other problems in both Judge Bates' opinion from 2011
24 which I believe is the opinion that defense counsel was
25 referring to, In Re Directives, and you can also -- those

Oral Argument

1 problems with upstream in the course of which the government
2 seizes entire streams of internet traffic as it flows across
3 networks not just the targets but many, many individuals who
4 have no relationship to the government's target and may be
5 communicating internationally or may be communicating
6 domestically.

7 The set of additional legal problems associated with
8 that program is spelled out even more clearly in the Jewel
9 brief that is referenced in footnote 22 of the amicus filing.

10 If the Court has no other questions, thank you.

11 THE COURT: Thank you, Mr. Toomey.

12 Do you have other motions you want to address
13 orally?

14 MR. BACHRACH: Briefly. If I may stand up?

15 THE COURT: Yes.

16 MR. BACHRACH: Very briefly touching on our motion
17 to suppress based upon outrageous government conduct. Just to
18 be very clear, our position on that case, if it wasn't already
19 clear, is that the government's violation of its notice
20 provisions simply returning both us and the government to
21 where it would be had they not violated the statute is
22 insufficient here because although it does allow us to be --
23 the defendant to be able to challenge the constitutionality of
24 the searches, it's really not a sanction in any way to the
25 government because this was something they should have done to

Oral Argument

1 begin with. And since this Court has already ruled that this
2 was an intentional DOJ-wide policy, we believe a stronger
3 statement than simply giving them a second chance is
4 appropriate in this case.

5 THE COURT: That I should dismiss the indictment?

6 MR. BACHRACH: No, not that you should dismiss the
7 indictment, that you should suppress the results of the FAA
8 surveillance.

9 We recognize that --

10 THE COURT: Even if it's consistent with the Fourth
11 Amendment?

12 MR. BACHRACH: Yes, your Honor. Yes, your Honor.
13 To prevent the government from in the future failing to give
14 the defendant notice so that they can properly litigate this
15 section. There are two motions here. We have a per se
16 challenge under the Fourth Amendment but there is also an as
17 applied challenge. So that assumes that the statute is
18 generally speaking constitutional but then whether or not it
19 is here, and that's where a sanction of suppression, even if
20 it's constitutional, would have an appropriate effect.

21 On the other motions, obviously, your Honor, a lot
22 of these are fruit of the poisonous tree. They sort of
23 trickle out of the others. The post-arrest statements would
24 only come into effect, and we acknowledge this, if we win one
25 of the first three motions.

Oral Argument

1 The discovery, I don't mean to relitigate. We have
2 already spent a whole hearing on it previously and I discussed
3 briefly why we think here it's additionally appropriate at
4 least with respect to their brief and their arguments with
5 respect to this brief.

6 The one of the final ones that I did want to address
7 though is a request that the government provide early
8 disclosure of its expert notice and of its Brady, Giglio
9 evidence, really Giglio evidence since obviously the
10 government has an obligation to turn over Brady as soon as
11 they recognize it.

12 This is a particularly complicated case and
13 particularly sensitive.

14 How do I put this? Based upon -- I'm being careful
15 because of CIPA. Depending who the government chooses to use
16 in their case I know will impact whether or not the defense
17 needs to file additional CIPA motions. And it's for that
18 reason that we ask that whatever the witnesses are going to be
19 in this case, be them lay witnesses or expert witnesses, we
20 learn that well in advance of the trial date so that if as I
21 expect these issues, classified issues to arise, we can
22 effectively litigate it in a proper manner so that it doesn't
23 delay the trial in any way.

24 All of our motions with respect to early discovery
25 of notice, even if it's under 404(b), it's all about we don't

Oral Argument

1 want to delay the trial, we want to shake sure we can proceed
2 as quickly as possible assuming there is a trial, and we
3 believe particularly here, it's going to be complicated and
4 it's going to involve classified information, the earlier we
5 get it, the better chance we have of avoiding unnecessary
6 delays.

7 Thank you.

8 MR. DuCHARME: Very briefly.

9 I guess on the last matter first. It is certainly
10 our intent for things to proceed smoothly towards trial. I
11 will speak to Mr. Bachrach after today's proceeding and try to
12 figure out what his CIPA concern is.

13 If we determine that there is some CIPA issue
14 coming, we will get it in front of the Court right away so it
15 shouldn't be a last minute problem. I think that we can
16 probably sort that out between ourselves. If not, we'll take
17 the Court's assistance as always but I think that maybe we
18 can. We don't have any secret witnesses in this case, so I
19 think that we can sort that out.

20 In terms of the characterization of the Court's
21 finding on this notice issue and specter of outrageous
22 government conduct, it's not my understanding that the Court
23 found that there was intentional misconduct by the Department
24 of Justice with respect to the notice issue.

25 I think the record is clear, I hope it is, that we

Oral Argument

1 gave the notice we thought we were supposed to give at the
2 time and when we realized we should have given different
3 notice, we didn't, and I hope that cuts against the notion of
4 outrageous government misconduct with respect to the notice
5 issue or even intentional withholding of the notice.

6 So I just wanted to say that. I think that is
7 really the only thing I need to say in response.

8 THE COURT: Remind me where we are on the CIPA
9 track? We have, our CIPA Section 4 motion was due and filed
10 January 9, I believe so that is pending before your Honor.
11 There was previously some classified information that we had
12 turned over to defense counsel prior to the plea. Some of
13 those issues are implicated by the CIPA motion in that regard.
14 There are some other issues as well and we are essentially
15 waiting for the decision on that motion.

16 MR. BACHRACH: Just to supplement that.

17 Much more recently, actually during the pendency of
18 this litigation while we were drafting the briefs,
19 considerable more classified information has been disclosed to
20 the defense.

21 We have not fully been able to look through it all
22 yet but we have received it recently. So there is more there
23 and I don't know yet if it's going to be litigated.

24 I know the original pretrial disclosure is something
25 that we would want to make public.

Oral Argument

1 THE COURT: The motion for relief based on
2 outrageous governmental misconduct is denied.

3 The rest of these motions, I'll take under
4 advisement.

5 Thank you.

6 MR. DuCHARME: Thank you, your Honor.

7 (Matter concluded.)
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25